IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.872 OF 2005

1.Niyaj Ajim Mulla Shaha)
Age 20 years, Occ.Service)
Residing at Lakshatirth Vasahat,)
Near Mhasoba Temple, Kolhapur.)
)
2.Satish Vishnu Kamble)
Age 22 years, Occ.Service)
Residing at Lakshatirth Vasahat,)
Near Mhasoba Temple, Kolhapur.)
(at present lodged in Kolhapur)
Central Prison, Kolhapur)) ..Appellants.
(Org.Accd.Nos.1 & 3)

V/s.

The State of Maharashtra ..Respondent.

Mr.S.V.Sadavarte, advocate for Appellants.

Mr. K.V.Saste, APP for Respondent.

CORAM: A.M.KHANWILKAR,J

DATE : DECEMBER 7, 2006.

ORAL JUDGMENT:

1. This appeal by accused Nos. 1 and 3 takes exception to the Judgment and order passed by V Ad-hoc Addl. Sessions Judge, Kolhapur dated August 31, 2005, in Sessions Case No.164 of 2004. The appellants alongwith other five accused were tried by the lower Court for offence punishable under Section 120(B), 395, 216-A and 212 of I.P.Code. The charges of offence under sections 216-A and 212 of I.P.Code

were against accused No.7, for having harboured the accused Nos. 5 and 6. However, as those accused (Nos.5 and 6) were acquitted of the charge of offence under section 120(B) and 395 of I.P.Code, there was no question of proceeding against the accused No.7 to hold him guilty for offence under section 216-A and 212 of I.P.Code.

2. Briefly stated, the prosecution case is that the accused Nos. 1 to 6 alongwith absconding accused Vishal and Juvenile accused Abhijeet hatched a conspiracy for robbing complainant(P.W.6) of his cash amount which he was going to deposit in the bank. The complainant(P.W.6) was at the relevant time in possession of amount of Rs.77,085/-, which was kept in the blue colour rexin bag. After collecting that amount from his office, while he was proceeding towards the bank on his motor cycle, one motor cycle bearing No. 729 driven by two persons came from front and obstructed his motor cycle. The complainant(P.W.6) counselled the said two persons to drive their motor cycle carefully and then started proceeding further. By that time, one motor cycle bearing number 1903, came from behind, on which three persons were ridding. The said motor cycle dashed the motor cycle of the complainant, as a result of

which the complainants motor cycle fell down. Soon thereafter, one more motor cycle arrived on the scene, which is later identified as bearing number 3350- which was driven by one person. Two motor cyclists riding motor cycle no.1903 out of the three got down after the complainant's motor cycle fell down and came near the complainant. One of them started snatching the rexin bag which was in possession of the complainant containing cash amount to be deposited in the bank as referred to above. When the complainant resisted, he was assaulted by stone on his head, which caused bleeding injury to the complainant. The complainant was threatened at the point of knife by the said motor cyclist and the rexin bag containing cash amount was forcibly taken away from the complainant. Two motor cyclists thereafter went to the motor cycle which was waiting nearby and attempted to run away from the scene of offence. At that time, the complainant somehow caught hold of one of the motor cyclist on the spot. The other motor cyclists disappeared from the scene alongwith rexin bag containing cash amount. The motor cyclist who was accosted on the spot was none other than the accused No.1, who is the appellant No.1 in this appeal. According to the version given by the P.W.6, after accused No.1 was accosted, he

disclosed the name of all the persons involved in the commission of the offence. Thereafter, the accused No.1 was taken to the nearby police station and the offence came to be registered. The offence took place at about 3 p.m. on 24th May, 2004. On the same day the police arrested the accused No.3 whose name was disclosed by the accused No.1 as one of the member of their gang. The accused No.3 and Juvenile Abhijeet were arrested with incriminatory material, namely rexin bag containing cash amount of Rs.66,730/- and the receipts which were referred to by the complainant at Waddawadi Fata hillok in the nearby vicinity. The arrest panchanama as well as seizure panchanama of the rexin bag and cash amount from accused No.3 and Juvenile Abhijeet has been recorded by the investigating agency. Panchanama has been duly prepared in the presence of independent panchas. Out of nine accused, chargesheet came to be filed only against seven accused. The trial of Juvenile Abhijeet has been separated. The accused pleaded not guilty and claimed to be tried.

3. Prosecution examined as many as 20 witnesses. In so far as the actual incident, the prosecution relies on the evidence of complainant(P.W.6), who was the victim of the incident; and P.W.14 who was doing

business of juice near the scene of offence. On analysing the relevant evidence, the Court below proceeded to record finding of guilt only against the accused Nos. 1 and 3 who are appellants before this Court. The other accused have been acquitted for lack of sufficient material to establish their complicity in the commission of the offence, giving benefit of doubt.

4. Before this Court, counsel appearing for the appellants would contend that even if the prosecution evidence regarding the actual incident were to be accepted as it is, the trial Court having acquitted the other accused on the same evidence committed manifest error in recording finding of guilt against the appellants/accused Nos. 1 and 3 only. It is next contended that from the evidence on record, it is not possible to hold that the prosecution has proved beyond reasonable doubt involvement of five or more than five persons in the commission of the offence so as to invoke section 395 of I.P.Code. These are the only two contentions raised at the hearing of this appeal. In the context of the argument which are canvassed before this Court, I shall advert to the relevant material to answer the same. To put it differently, it is not necessary to

burden this judgment with the entire prosecution evidence.

5. The first argument proceeds on the premiss that the prosecution evidence regarding actual incident is not trustworthy. This assumption is on the basis that the trial Court has found that there was absolutely no evidence as against other accused while referring to the self-same evidence; If it is so, it was not possible to record finding of guilt against the appellants/accused Nos. 1 and 3 as well. It is also contended that if the evidence of P.W.6 and P.W.14 were to be accepted, it would be seen that P.W.6 had identified all the six accused Nos. 1 to 6; and P.W.14 had identified accused Nos. 1 and 2. Nevertheless, the trial court proceeded to acquit the accused No.2 and on the other hand, recorded finding of guilt only against accused Nos. 1 and 3 who are appellants before this Court. The argument seems to be attractive, but cannot be countenanced. This is so because, in so far as involvement of accused No.1 and 3 are concerned, there is clear evidence to indicate their complicity in the commission of the offence in question. P.W.6 who is the victim of the incident has deposed about the circumstances in which the occurrence took place. On 24th May, 2004, he

proceeded to HDFC Bank on motor cycle for depositing sum of Rs.77,085/- in cash at about 2.55 p.m.. While he was proceeding on his motor cycle from Rajarampuri main road to Parekh Bridge, at the turn just before the bridge, one motor cycle No.MH09-AK-729 came from front and obstructed his motor cycle. The two

persons aged about 20 to 22 years were on that motor cycle. After telling them to ride carefully when P.W.6 intended to proceed further, one motor cycle which came from behind dashed his motor cycle. As a result of which his motor cycle fell down. There were three persons sitting on the motor cycle, which came from behind and dashed his motor cycle. He has given number of the said motor cycle as GA-02-L-1903. He has then stated that third motor cycle also arrived on the scene which was driven by one person. The motor cycle which had dashed from behind, two persons got down therefrom and came towards him. They attempted to snatch away the rexin money bag, which was tied to his motor cycle. As he resisted that attempt, one person out of the two motor cyclist came and hit him with a stone on his head. He has specifically stated that the person, who had hit him with a stone. He has stated that he was also pointed out a knife and threatened not to raise alarm. Those two persons then again went back to the motor cycle which was near the electric pole. P.W.6 has deposed that he caught hold of one of the motor cyclist from behind, who fell down from the motor cycle. The other two persons on the motor cycle fled away from the scene on their motor cycles. The other two motor cyclist also escaped. He has then stated that as he had raised shouts, 10 to 12

persons came to his help. The person who was caught hold by him gave his name as Niyaz Ajim Mulla Shaha, who is appellant No.1/accused No.1. On enquiry he disclosed the names of other accused, namely, Prashant Chougule, Satish Kamble, Abhijeet Falkar, Rahim Nadaf & Vishal Jadhav. This witness has also given break up of the amount which was kept in the rexin bag to be deposited in the bank. He has then stated that police had called him on 25th May, 2004 for identifying four accused who were arrested as also to identify the rexin bag and the amount recovered from the accused. He identified those four accused as also the rexin bag and the cash amount. Thereafter on 23/6/2004 he was called by the police to identify three more accused. Out of them, he could identify only two accused. P.W.6 has identified those six accused in court as well. This witness has been cross-examined at length. However, there is nothing in the cross-examination which would persuade the Court to doubt the credentials of this witness or the veracity of the events spoken by him. The trial Court has rightly accepted the evidence of this witness as trustworthy. In the cross-examination, the only suggestion given is with regard to the incident in question, which

however, has been denied by the P.W.6. There is no cross examination of this witness on the point of

identification of accused persons by this witness in the police station as well as in the Court. The incident deposed to by the P.W.6 is corroborated by the evidence of P.W.14 to the limited extent of the events seen by him. P.W.14 has noticed one Hiro honda motor cycle which came from behind and dashed the motor cycle driven by the complainant. He has deposed that three persons were riding the said motor cycle which came from behind. This fact is corroborated by the complainant(P.W.6). Indeed, the P.W.14 has identified only accused Nos. 1 and 2 before the police as well as in Court. However, the fact remains that with regard to the actual incident there is legal evidence on record which supports the case of the prosecution about the involvement of accused No.1 and 3. It is relevant to note that accused No.1 was accosted on the spot and handed over to the police immediately after the incident. Accused No.1 disclosed involvement of other persons in the commission of the offence. On the basis of that information, the police party proceeded to trace out the accused who had taken away the rexin bag and the cash amount immediately after the incident. The police party on the same evening on the date of incident were able to trace out the accused No.3 and Abhijeet who were in possession of rexin bag and the

cash amount of Rs.66,730/-. Both of them were arrested on the spot and seizure panchanama was prepared. The prosecution has proved the seizure of rexin bag as well as cash amount in question. That evidence has been accepted by the trial Court. There is no reason to take a different view. No attempt has been made before this court to challenge the finding of the trial Court on the point of seizure of rexine bag and cash amount from accused Nos. 3 and Abhijeet. In that sense, the accused No.3 has been arrested and incriminatory material has been recovered from him which indicates his complicity in the commission of the offence. No explanation is offered by Accused No.3 to discredit the recovery of incriminating material from him.

6. For the time being, even if we were to ignore about the disclosure made by accused No.1 to police about the involvement of accused No.3, there is evidence of P.W.6 which has remained unchallenged-that accused No.1 immediately on being accosted disclosed the name of persons involved. That evidence has not be challenged at all. Be that as it may, there is clear evidence about the involvement of accused Nos. 1 and 3, who are appellants before this court. Thus understood, there is no reason to overturn the

conclusion reached by the trial Court recording finding of guilt against accused Nos.1 and 3.

7. The argument that the trial Court on the basis of the same evidence has given benefit of doubt to the other accused will only have to be stated to be rejected. In so far as accused Nos. 4, 5 and 6 are concerned, no fault can be found with the approach of the trial Court that there is absolutely no legal evidence to indicate their complicity in the commission of the offence. Indeed, those accused have been identified by P.W.6. The fact remains that no incriminatory material has been recovered from them, as in the case of Accused No.3. Indeed, P.W.14 as well as P.W.6 have identified the accused No. 2 before the police as well as in the Court. But, besides that, there is no other evidence about the role played by accused No.2 and no incriminatory material has been recovered from him. As in the case of accused Nos. 4,5 and 6, benefit of doubt was required to be given to accused No.2 on the same analogy. Assuming that the accused No.2 has been wrongly acquitted by the trial Court, that will be of no avail to the appellants/accused Nos. 1 and 3 against whom clear evidence of their complicity has

come on record. It is well-established that wrong decision in favour of the co-accused will not come to the aid and cannot be the basis to acquit another accused. Suffice it to observe that in so far as accused Nos. 1 and 3 are concerned, there is sufficient material to indicate their complicity in the commission of the offence and for which reason the finding of guilt recorded by the trial Court against them merits no interference.

8. The argument of the appellants that only P.W.6 has spoken about the involvement of five or more persons and that fact has not been corroborated by any other prosecution witness also does not commend to me. It is argued that the other eye witness examined by prosecution is P.W.14, who has not spoken about involvement of five or more persons. As mentioned earlier, P.W.14 has spoken about the events which were seen by him. Whereas, P.W.6 has deposed about all the circumstances which led to the incident in question. There is no reason to doubt the veracity of P.W.6. The fact that the three motor cycles were engaged in the commission of offence on which six persons had arrived at the scene has been

spoken by P.W.6. There was no reason for the P.W.6 to falsely implicate or conjure facts, so as to make out offence under section 395 of I.P.Code. Even if that claim was to be ignored, the fact remains that there is direct and clear evidence against the accused No. 1 and 3 of having engaged in the offence of robbery, if not dacoity. Both the offences are punishable with similar punishment, as awarded by the trial Court. In other words, even if the appellants were to succeed in their argument that section 395 of I.P.Code cannot be invoked in the fact situation of the present case, on the basis of prosecution evidence which has been accepted by the trial Court and which findings I am inclined to uphold, it would be obvious that accused Nos. 1 and 3 will have to be proceeded for offence of robbery, which also is punishable with similar punishment. In that sense, it will be academic exercise to enter into the discussion on this aspect any further. For, the sentence imposed by the trial Court is R.I. for five years only and fine amount of Rs.3,000/- i.d. to suffer R.I. for one year for offence under section 395 of I.P.Code and to suffer R.I. for one year and to pay fine of Rs.2000/- i.d. R.I. for 3 months for offence under section 120(B) of I.P.Code. That sentence being just and reasonable will have to be

upheld. I find no reason to depart from the punishment imposed by the trial Court.

9. Hence this appeal should fail. The same is dismissed.